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No.

IN THE
**SUPREME COURT OF THE
UNITED STATES**
OCTOBER TERM, 1983

MICHAEL ALAN CROOKER,

Petitioner,

v.

UNITED STATES PAROLE COMMISSION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

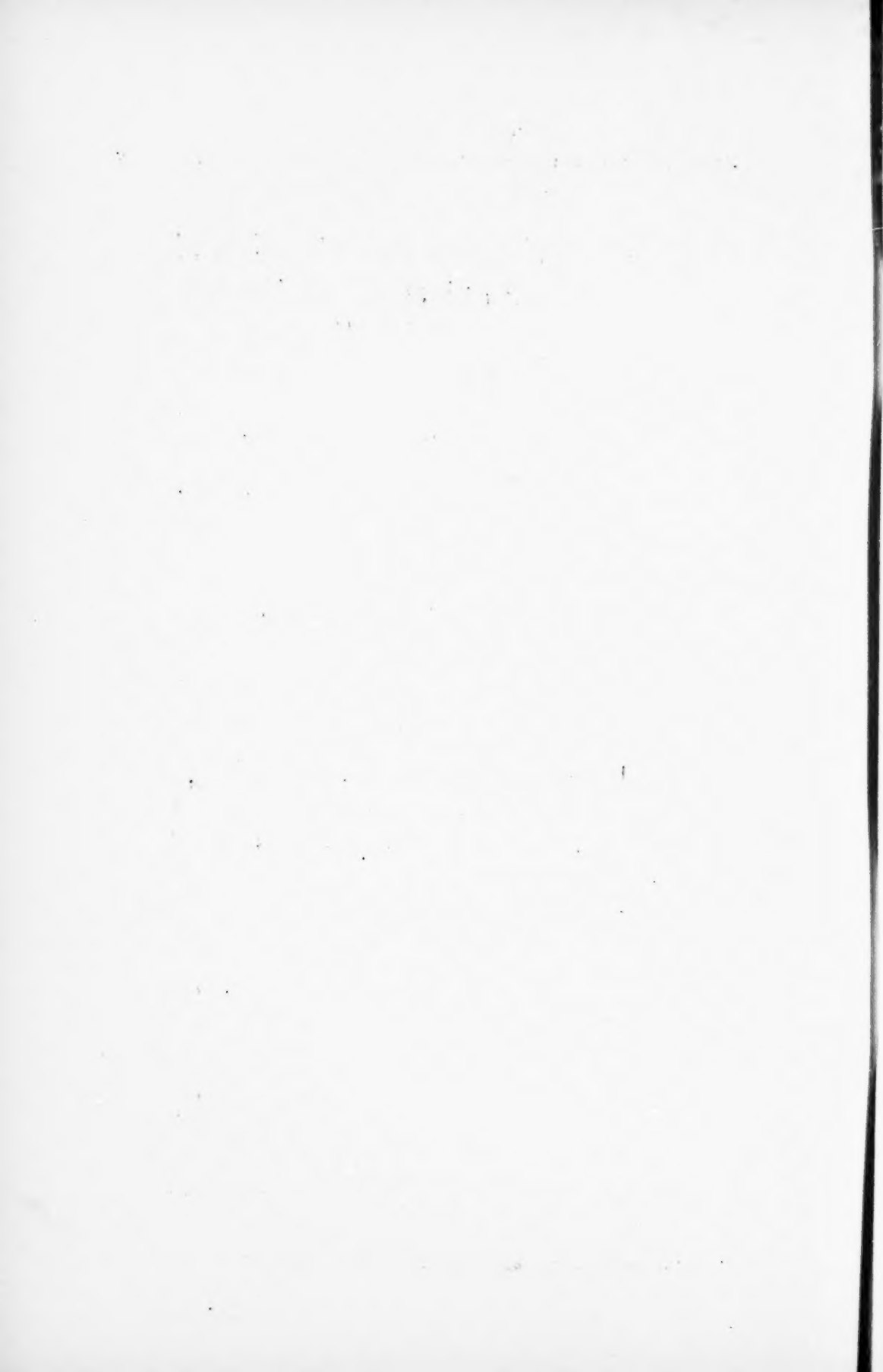
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June 18, 1984

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(i)

QUESTION PRESENTED

Did the Court of Appeals err in concluding that copies of presentence reports, which are in the possession of the Parole Commission and which Congress has directed the Commission to consider when making parole determinations, are outside the reach of the Freedom of Information Act simply because they were originally prepared by court personnel for use in sentencing?



(iii)

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UNITED STATES PAROLE COMMISSION,

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**PETITION FOR A WRIT OF CERTIORARI
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APPEALS FOR THE FIRST CIRCUIT**

Michael Alan Crooker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 730 F.2d 1 (1984) and is reproduced in the Appendix ("App.") at pages 1a-20a.

The opinion of the United States District Court for the District of Massachusetts, dated August 26, 1983, is reproduced in the Appendix (App. 22a-24a). The opinion is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1984 (App. 21a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §§ 4201 *et seq.* (the "Parole Act"), are set out at App. 25a-27a.

STATEMENT OF THE CASE

Petitioner Michael Crooker is on parole from the Federal Correctional Institute in Otisville, New York. In this FOIA action he seeks to obtain a copy of his presentence report. Although twice he has been allowed to read the report in its entirety, once shortly before his sentencing in 1977, and again in connection with a parole hearing, he has not been permitted to keep a copy of it (App. 2a). Since the report will continue to be a principal source of information for future decisions that the Commission may make concerning the terms and conditions of petitioner's liberty, he wants a copy of the report in order to be able to anticipate and respond to arguments based upon information contained in it.

Petitioner's presentence report, like that of every other prisoner convicted of a federal crime, was prepared by the probation office of the United States District Court where he was convicted, in this case, the District of Massachusetts. It was used in his 1977 sentencing by District Judge Frank H. Freedman of that court, and pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, Judge Freedman gave petitioner his presentence report to read in its entirety prior to sentencing. He was not, however, provided with a copy to keep (App. 2a).

Shortly after petitioner was incarcerated, a copy of his presentence report was routinely transmitted to the Bureau of Prisons. It was subsequently transferred to the Parole Commission in 1979, pursuant to that portion of the Parole Act which requires probation officers and government agencies to furnish such reports to the Commission upon request. 18 U.S.C. § 4205(e). In March 1980, in connection with his parole proceedings and as required by 18 U.S.C. § 4208(b), the Commission allowed petitioner to review his presentence report. Although the Commission let Mr. Crooker take notes on the report, it did not permit him to keep a copy (App. 2a).

On January 22, 1983, while he was still incarcerated, petitioner submitted a request to the Parole Commission under the FOIA for a copy of his presentence report and for all other documents related to his incarceration. After exhausting his administrative remedies, he filed a *pro se* action in the United States District Court for the District of Massachusetts on March 25, 1983, to compel the Parole Commission to disclose the requested records.¹

On May 16, 1983, in support of its motion to dismiss, the Parole Commission filed the affidavit of its Regional Counsel, Henry T. Sadowski, which stated that petitioner's presentence report was being withheld from him on two grounds. First, the Commission stated that the report "is a court document that is not subject to the FOIA." Second, the Commission took the position that it was prohibited from releasing the report by a "standing order" signed by the Judges of the District of Massachusetts on April 13, 1981, which stated that presentence reports were merely loaned to the Parole Commission by that court and could not be disclosed except pursuant to the provision of the Parole Act which requires disclosure to the prisoner 30 days prior to a parole determination proceeding.

¹ The only other documents still at issue in this case are certain of petitioner's medical records. The court of appeals vacated the district court's decision allowing those documents to be withheld and remanded that portion of the case for further proceedings. (App. 20a).

The case was considered by the district court on cross motions for summary judgment. On August 26, 1983, Judge Freedman, the same judge who in 1977 had allowed petitioner to read his presentence report, issued an Order, accompanied by a three page Memorandum, denying petitioner's motion for summary judgment and granting the government's motion (App. 22a-24a). Judge Freedman ruled that the presentence report was properly withheld both on the basis of the standing order of the Massachusetts District Court and on the ground that "[t]he presentence report is a court document not subject to the FOIA" (App. 23a). Petitioner appealed that ruling and secured representation from the undersigned counsel.

In an opinion issued on March 21, 1984, the court of appeals affirmed the district court's decision that the presentence report is not an "agency record" under the FOIA — a holding which the court recognized (App. 5a-6a) is in direct conflict with two recent decisions of the District of Columbia Circuit.² The court began its analysis by disavowing any reliance on either the standing order of the district court or on other cases which have held that presentence reports are court documents falling outside the jurisdiction of the FOIA (App. 7a-8a).

Recognizing that the relevant test for determining whether presentence reports are agency records is the extent of the Parole Commission's control over them, the court of appeals held that the Commission lacked the requisite degree of control (App. 18a). The court based its decision on its conclusion that the sentencing court exercises more control over presentence reports during the sentencing process than the Parole Commission does during the parole process (App. 10a). It reached this result although the Parole Act requires probation officers to furnish presentence reports to the Parole Commission upon request, 18 U.S.C. § 4205(e), and requires the Commission to rely on presentence reports in making

² *Lykins v. Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984); *Carson v. Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980).

parole determinations, 18 U.S.C. § 4207(3). Nonetheless, the court of appeals held that “[the] use of the presentence report by the Parole Commission clearly does not suffice to convert the presentence report from a court document into an agency record” (App. 11a).

REASONS FOR GRANTING THE WRIT

THERE IS A SPLIT IN THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

This case presents an important question under the FOIA — the appropriate criteria governing the threshold determination of whether a document is an “agency record” subject to the disclosure requirements of the Act. The particular records at issue, presentence reports, are held by the respondent for virtually every prisoner currently incarcerated and for many thousands of others who have been paroled. These individuals have an intense interest in obtaining copies of their reports, which can have a profound impact on their freedom and opportunities for rehabilitation. In addition, because the proper test to be applied in this case is likely to govern whether numerous other documents, which are in the possession of a federal agency but which originated outside the agency, are “agency records”, the question presented has widespread significance for the implementation of the FOIA.

The Freedom of Information Act requires each federal agency to make its records “promptly available to any person” upon request, 5 U.S.C. § 552(a)(3), unless the records are exempt under one of the Act’s nine exemptions set forth in 5 U.S.C. § 552(b). The Act vests jurisdiction in the district courts “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). As this Court has observed, Congress limited access under the statute to “agency records”, but it did not provide any definition of that term. *Forsham v. Harris*, 455 U.S. 169, 178 (1980). In *Forsham*, this Court held that records of a private group of physicians

and scientists were not “agency records”, because the records were not in the possession of a federal agency, even though the agency had an absolute right to obtain them. Thus, the Court held that as a threshold matter, in order to be an “agency record”, the document must be either “created or obtained by a federal agency”. 445 U.S. at 186.

In a companion case to *Forsham*, this Court also ruled that notes of official telephone conversations involving Henry Kissinger were not “agency records” subject to disclosure under the FOIA. *Kissinger v. Reporters’ Committee for Freedom of the Press*, 445 U.S. 136 (1980). Although the documents were kept in Mr. Kissinger’s office while he was Secretary of the Department of State — a federal agency subject to the Act — they had been prepared while he was still National Security Adviser to the President, a position which is exempt from the FOIA under 5 U.S.C. § 552(e). This Court held that the “mere physical location” of the notes did not render them “agency records”, since “[t]he papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department’s files, and they were not used by the Department for any purpose.” 445 U.S. at 157.

Thus, reading *Forsham* and *Kissinger* together, this Court has indicated, but not expressly held, that a document created by a non-agency is nevertheless an “agency record”, when, in addition to possession, the agency exercises some other indicia of control over the document. However, the Court has not had occasion to provide a precise definition of the statutory phrase, and it declined to review an earlier decision of the D.C. Circuit which raised the issue in another context. *Goland v. Central Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978), *rehearing denied*, 607 F.2d 367 (1979), *cert. denied*, 445 U.S. 927 (1980).³

³ In *Goland*, the court of appeals held that a transcript of secret congressional hearings was not an agency record, despite its presence in the files of the CIA, because the transcript was provided to the agency for limited use as a reference document only, and it remained under the control of Congress.

As the First Circuit recognized, the decision below conflicts directly with two recent decisions of the District of Columbia Circuit. In *Carson v. Department of Justice*, 631 F.2d 1008 (1980), and more recently in *Lykins v. Department of Justice*, 725 F.2d 1455 (1984), that Circuit held that a presentence report in the possession of the Parole Commission is an "agency record" subject to the FOIA, and that a copy of it must be provided to the prisoner upon request, unless all or part of the report may be withheld under one of the Act's nine exemptions.

In reaching its decision in *Carson*, the D.C. Circuit applied the "control" test first enunciated in *Goland v. CIA*, *supra*, and discussed with approval by this Court in *Kissinger*, *supra*, 445 U.S. at 157. The *Carson* court concluded that the Parole Commission had the requisite "control" over the presentence report for several reasons. First, it found that the 1975 amendment to Rule 32(c) of the Federal Rules of Criminal Procedure, which, with limited exceptions, requires disclosure of the report to the prisoner prior to sentencing, "substantially dilutes the sentencing court's control over the presentence report, even before that report is transmitted to the parole authorities and quite apart from the control over the report vested by statute in the parole authorities." 631 F. 2d at 1012.

Second, the *Carson* court found that the 1976 Parole Act gave the Parole Commission full control over presentence reports in its possession. 631 F.2d at 1012-13. The court explained that Congress did so by requiring probation officers to furnish the reports to the Commission, 18 U.S.C. § 4205 (e); requiring the Commission to consider the reports in making parole determinations, 18 U.S.C. § 4207(3); and requiring the Commission to let prisoners read their reports at least 30 days prior to their parole proceedings (with the same exemptions from mandatory disclosure that are enumerated in Rule 32(c)), 18 U.S.C. § 4208(b).

In its more recent decision in *Lykins v. Department of Justice*, *supra*, the D.C. Circuit expressly and emphatically

reaffirmed its decision in *Carson* that a presentence report in the possession of the Parole Commission is an "agency record" subject to the FOIA. 725 F.2d at 1460. Moreover, the *Lykins* court rejected all of the additional arguments put forward by the government, including the Commission's claim that, because of a "standing order" similar to the one issued by the Massachusetts District Court, the report was not "improperly withheld" within the meaning of the FOIA, 5 U.S.C. § 552(a)(4)(B), as construed by this Court in *GTE Sylvania v. Consumers Union of the United States*, 445 U.S. 375 (1980). In response to these additional arguments, the *Lykins* court stated that it would not "let in through the back door the arguments [it] rejected in *Carson*." 725 F.2d at 1461.

The court of appeals for the First Circuit expressly rejected the analysis of the D.C. Circuit in both *Carson* and *Lykins* (App. 5a-10a). Instead, it created a new test for determining whether a document is an "agency record": did the originator of the record have "greater" control over it when it was in that entity's possession, than does the agency which now has possession of the record? (App. 10a). Since the court of appeals found that the sentencing court had greater control, the obvious conclusion was that the copy of the report that was transferred to the Commission did not become an "agency record" (App. 10a).

Not only is the First Circuit's test unique for determining agency record status under the FOIA, but it is inconsistent with the approach taken in *Forsham* and *Kissinger* — that records in the possession and control of a federal agency are "agency records" subject to the Act's disclosure requirements. Furthermore, application of the "greater control" test would require the courts to engage in a balancing process, nowhere suggested by Congress, which could result in exempting from the Act many documents on which the government routinely relies in performing its decision-making functions, *i.e.*, documents submitted by, or subpoenaed or otherwise obtained from, private industry or individuals. Thus, since, as the D.C. Circuit found, the presentence report is "central to the Parole Commission's primary function," *Carson*, 631 F.2d

at 1015, it should be considered an "agency record" under the Act.

In addition to the conflict on this issue between the D.C. and First Circuits, the Tenth and Second Circuits have concluded that presentence reports are not subject to the FOIA. *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (*per curiam*), cited with approval in *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976), and *United States v. Charmer Industries*, 711 F.2d 1164, 1170 n.6 (2d Cir. 1983). In addition, district courts in two other circuits have held that presentence reports fall outside the reach of the FOIA. *Smith v. Flaherty*, 465 F.Supp. 815, 819 (M.D. Pa. 1978); *Cotner v. United States Parole Commission*, Civil No. 83-1687 (N.D. Tex. Sept. 14, 1983), *appeal pending*, No. 83-1757 (5th Cir.).

Thus, there is a direct conflict in the circuits over whether presentence reports are "agency records" subject to the FOIA. Moreover, while knowledgeable requesters may be able to obtain copies of their presentence reports after *Carson* and *Lykins*, by utilizing the liberal venue provision of the FOIA and filing their complaints in the District of Columbia, 5 U.S.C. § 552(a)(4)(A), other requesters, who are either less informed or find it more convenient to file where they reside, may be denied access to their reports. Accordingly, in order to resolve the conflict in the circuits, to provide for uniform treatment of requesters seeking access to their presentence reports, and to clarify the definition of "agency records", the requested review should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 18, 1984

APPENDIX

**United States Court of Appeals
For the First Circuit**

No. 83-1687

MICHAEL ALAN CROOKER,

Plaintiff, Appellant,

v.

UNITED STATES PAROLE COMMISSION,

Defendent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman, *U.S. District Judge*]

Before

Coffin, Aldrich and Breyer,

Circuit Judges.

March 21, 1984

COFFIN, *Circuit Judge*. This case requires us to determine whether presentence reports are subject to the mandatory disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or more specifically, whether presentence reports are "agency records" within the meaning of the FOIA.

Plaintiff-appellant Michael Alan Crooker is on parole from federal prison. In October 1977, the probation office of the United States District Court for the District of Massachusetts prepared Crooker's presentence report for use in Crooker's sentencing before that court. Pursuant to rule 32(c)(3) of the Federal Rules of Criminal procedure, the court permitted Crooker to read his entire presentence report prior to sentencing. Crooker was not permitted to keep a copy of the report. After sentencing, the report was transferred to the United States Parole Commission, pursuant to the Parole Commission and Reorganization Act of 1976 (Parole Act), 18 U.S.C. § 4205 (e), which requires the courts' probation officers to furnish "information available to such officer[s]" to the Commission upon request. Prior to his parole determination proceeding, in March 1980 Crooker again read his presentence report, which the Parole Commission had provided to Crooker under the mandate of 18 U.S.C. § 4208(b)(2), which requires the Commission to grant the prisoner "reasonable access" to a report to be used by the Commission in making a parole determination. The Parole Commission, like the sentencing court, did not permit Crooker to keep a copy of the report.

In January 1983, Crooker filed a FOIA request with the Parole Commission, seeking release of his presentence report and other documents. After Crooker commenced this FOIA action in federal district court, the Parole Commission released many documents, but withheld copies of his presentence report and medical (drug detoxification) records the Parole Commission had obtained from the Elmcrest Psychiatric Institute. On cross-motions for summary judgment, the district court granted the Parole Commission's motion and denied Crooker's. In a brief memorandum and order,

the district court held that the Parole Commission had properly withheld the presentence report on the basis of an order of the United States District Court for the District of Massachusetts¹ and on the basis of "the Parole Commission's power to make independent judgments concerning the identification of exemptable material". The district court also held that a presentence report is a court document, not an agency document, and is therefore not subject to the FOIA.

The court further ruled that the Parole Commission had properly withheld the medical records, because, according to the court, the Parole Act, 18 U.S.C. § 4208(c)(2), provides a specific statutory exemption from FOIA disclosure, 5 U.S.C. § 552(b)(3), for "material obtained upon the promise of confidentiality". The court ordered the Parole Commission to furnish Crooker with a summary of the contents of the medical records pursuant to the Parole Act, 18 U.S.C. § 4208(c). The Parole Commission complied with this order, and plaintiff appealed from the remainder of the district court's judgment.

I. The Presentence Report

An agency need disclose only "agency records" under the FOIA, 5 U.S.C. § 552(a)(4)(B). Unfortunately, the FOIA contains no definition of "agency records", the crucial term in this case. *See Forsham v. Harris*, 445 U.S. 169, 178 (1980). Nor

¹ The order, signed on April 13, 1981, by all 10 active district court judges for the District of Massachusetts, stated:

"Any copy of a presentence report which the court makes available, or has made available, to the United States Parole Commission or the Bureau of Prisons constitutes a confidential court document and shall be presumed to remain under the continuing control of the court during the time it is in the temporary custody of these agencies. Such copy shall be lent to the Parole Commission and the Bureau of Prisons only for the purpose of enabling those agencies to carry out their official functions, including parole release and supervision, and shall be returned to the court after such use, or upon request. Disclosure of a report is authorized only so far as necessary to comply with Title 18, U.S.C., Section 4208(b)(2). Copies of presentence reports shall be stamped with an appropriate legend consistent with this order".

does the FOIA's legislative history shed any helpful light on this issue. See *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1106 & n.48 (D.C. Cir.), *vacated in part on other grounds*, 711 F.2d 1076 (D.C. Cir. 1983)(per curiam). The difficulty in deciding whether presentence reports are "agency records" arises from the hybrid function of the presentence report. The probation service of the United States courts creates the presentence report, Fed. R. Crim. P. 32(c)(1), and the courts are not agencies within the meaning of the FOIA. 5 U.S.C. § 551(1)(B). However, after the court has used the presentence report in sentencing a defendant, the probation officer must, upon request from the Parole Commission, transmit a copy of the presentence report to the Parole Commission for use in parole determinations. After transmittal, the report is jointly possessed by a FOIA controlled agency (the Parole Commission), see 18 U.S.C. § 4218(a), and a FOIA-exempt entity (the courts).

In attempting to divine whether Congress intended presentence reports to be agency records under the FOIA, other courts have examined the relative degree of control exercised by the FOIA agency and the FOIA-exempt body over the contested documents. Of course "control" is a protean term, and courts have not adhered to a single variant of the control test for determining whether a document is an agency record for FOIA purposes. In *Carson v. U.S. Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980), in which the court held that a presentence report is an agency record within the FOIA, the court applied the control test set out in an earlier opinion from that circuit, *Goland v. Central Intelligence Agency*, 607 F.2d 339, 346-47 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). In *Goland*, the court decided that the FOIA's applicability to a document generated by an expressly exempted non-agency (in that case, Congress) depended on "whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the

document resides". *Carson*, 631 F.2d at 1010 (quoting *Goland*, 607 F.2d at 347); accord *Ryan v. Department of Justice*, 617 F.2d 781, 785 (D.C. Cir. 1980); *Warth v. Department of Justice*, 595 F.2d 521, 523 n.7 (9th Cir. 1979).

The *Carson* court premised its decision on analysis of Rule 32(c) of the Federal Rules of Criminal Procedure, as amended in 1975, and the Parole Act of 1976. Prior to the 1975 amendment to Rule 32(c), the sentencing court enjoyed unfettered discretion to withhold any or all of the presentence report from the defendant. The *Carson* court noted that the amendments to Rule 32(c) substantially diluted the sentencing court's control over the presentence report, because Rule 32(c) now requires the court to disclose the contents of a presentence report to a defendant prior to sentencing. The court may withhold material that contains diagnostic opinions, confidential sources, or information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other person, but the sentencing court must summarize the factual information contained in withheld portions to be relied on in determining sentence. Fed. R. Crim. P. 32(c)(3)(A) & (B); see *Carson*, 631 F.2d at 1011-12.

The *Carson* court also held that the Parole Act indicated that the Parole Commission controlled presentence reports in its possession. The Parole Act expressly requires the Parole Commission to consider presentence reports, "if available and relevant", in making its parole determinations. 18 U.S.C. § 4207(3). The Parole Act also requires the probation officers of the courts to furnish "information available to such officer[s]" to the Parole Commission upon request. 18 U.S.C. § 4205(e). Finally, the Act requires the Parole Commission to grant to requesting prisoners "reasonable access" to their presentence reports prior to parole determination hearings, subject to exemptions that are practically identical in substance to the exemptions provided by Rule 32(c)(3). 18 U.S.C. § 4208(b) & (c); see *Carson*, 631 F.2d at 1012-15. The *Carson* court concluded that because "[t]he presentence

report is, after all, central to the Parole Commission's primary function", it should constitute an agency record for FOIA purposes. 631 F.2d at 1015.

Although the Supreme Court has not yet ruled directly on the control test employed in *Carson*, the Court gave implicit approval to that standard in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980). In *Kissinger*, the court held that transcripts of telephone conversations recorded by Henry Kissinger while he was National Security Adviser to the President (and thus exempt from the FOIA, 445 U.S. at 156) did not become agency records merely by their relocation to the State Department during Kissinger's tenure as Secretary of State. In rejecting the argument that mere possession could be determinative of agency record status, the Court noted that the State Department (a FOIA agency) did not control, generate, or use the documents.² *Id.* at 157.

More recently, the D.C. Circuit has attempted to refine the *Goland/Carson* control test in light of the supreme Court's decision in *Kissinger*. Whereas cases decided under the *Goland* standard had focused on the control retained by the creator of the document, *Kissinger* focused on the degree of control exercised by the agency that has received the document. In *Paisley v. Central Intelligence Agency*, 712 F.2d 686, 693 (D.C. Cir. 1983), the court reconciled the cases as "standing for the general proposition that the agency to whom the FOIA request is directed must have *exclusive control* of the disputed documents" (emphasis added).³

² In *Forsham v. Harris*, *supra*, the Court held that an agency must "create or obtain" a record as a prerequisite to it becoming a FOIA "agency record". 445 U.S. at 182. The Court explained further that creation or possession was a necessary, but not always sufficient, condition. *Id.* at 185 n.16.

³ The *Paisley* "exclusive control" standard has not, however, established itself as the accepted test for agency record status. The "exclusive control" test stands at odds with the D.C. Circuit's recent reaffirmation that presentence reports are agency records under the FOIA. See *Lykins v. United States Department of Justice*, No. 83-1031, slip op. at 5-9 (D.C. Cir. Jan. 27, 1984). Judge Wright, who authored both *Paisley* and *Lykins*, did not mention *Paisley* in *Lykins* and instead applied the pre-

Rather than attempt further to parse the labels “control”, “exclusive control” and “free disposition”, we admit that “control” for FOIA purposes has no precise definition and may well change as relevant factors assume varying importance from case to case. The key factor in this inquiry is congressional intent: Did Congress give the Parole Commission sufficient control, relative to control given to the courts, over presentence reports to make such reports agency records under the FOIA? Perhaps wisdom lies in recognizing that where Congress has sought to make one report serve two uses, each of the two users obviously exercises some “control”. This is not really a “joint venture” situation as the Court briefly contemplated in *Forsham*, 445 U.S. at 180, but rather a dual venture situation. The inquiry is not merely to see which of the two users has more numerous indicia of control, but to inquire more deeply as to whether the completeness of the agency’s dominion over and the centrality of its reliance upon the report are such as to outweigh the compelled surrender by the non-agency (the court) of its traditional and statutorily authorized discretion to withhold distribution.

We begin by disavowing reliance on two factors that might ordinarily be thought controlling. The first is the order issued by the judges of the District Court of the District of Massachusetts. *See supra* note 1. Since an expression of intent by a court to retain control over a presentence report is valid only insofar as the court’s expression of intent does not contravene the intent of Congress, to say that the intent of the originating court illuminates the intent of Congress would involve circular reasoning. We therefore find that the judges’ order has no relevance to our inquiry into whether the court or the Parole Commission controlled the presentence report in this case. *Cf. Lykins*, slip op. at 9.

Paisley control test of *Goland* and *Carson*. *See supra* at 5. Given the joint possession of presentence reports by the courts and the Parole Commission, the creation of the reports by the courts, and the far from unambiguous allocation of control over the reports established by relevant federal statutes, it seems to us that the “exclusive control” test of *Paisley* is incompatible with the subsequent confirmation in *Lykins* of *Carson*’s holding that presentence reports are agency records for FOIA purposes.

A second factor is the weight of authority, i.e., the fact that opposed to the decisions we have cited from the District of Columbia circuit stand three court of appeals cases (from two circuits) and one district court case. We distance ourselves from these cases, however, because they devoted little or no analysis to the control issue or antedated the statutory changes on which *Carson* placed so much stress. These cases are: *United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1170 n.6 (2d Cir. 1983) (presentence report is a court document not within purview of the FOIA, notwithstanding use or retention of report by Parole Commission); *United States v. Dingle*, 546 F.2d 1378, 1381 (10th Cir. 1976); *Cook v. Willingham*, 400 F.2d 885, 885-86 (10th Cir. 1968) (per curiam) (presentence report remains in exclusive control of sentencing court despite any joint utility it may eventually serve); *Smith v. Flaherty*, 465 F. Supp. 815, 819 (M.D. Pa. 1978) (same). The most recent case, *Charmer Industries*, did not mention *Carson*. The other three cases were decided before *Carson*, and *Cook*, which the Tenth Circuit reaffirmed without discussion in *Dingle*, was decided before the passage of the statutes (Parole Act and amended Fed. R. Crim. P. 32(c)) that *Carson* found determinative.

To begin our inquiry, we look at the court's power over and use of the presentence report. A probation officer acting as an arm of the court creates the presentence report for the purpose of informing the court's discretion prior to sentencing. See *United States v. Charmer Industries, Inc.*, 711 F.2d at 1170 ("principal function of the presentence report is to assist the court in determining the appropriate sentence") (citation omitted); *United States v. Burton*, 631 F.2d 280, 282 (4th Cir. 1980); *United States v. Krause*, 78 F.R.D. 203, 204 (E.D. Wis. 1978).⁴

⁴ In deciding whether a document is an agency record, courts have considered the originating entity's role and the agency's role, if any, in creating the document. E.g., *Kissinger*, 445 U.S. at 157; *Paisley*, 712 F.2d 692.

Congress has empowered the courts to decide in which situations a presentence report is needed. The probation officer need not create a presentence report if the court finds that the record contains sufficient information to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record. Fed. R. Crim. P. 32(c)(1); *see Hazelwood v. Arnold*, 539 F.2d 1031, 1033-34 (4th Cir. 1976) (per curiam) (ordering of presentence investigation and report is discretionary with court); *United States v. James*, 528 F.2d 999, 1023 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976). If a court determines that a presentence report would not aid the court in its sentencing function, no presentence report exists for the Parole Commission to obtain. Although the Parole Act requires the Parole Commission to consider available and relevant presentence reports in making parole determinations, 18 U.S.C. § 4207(3), and requires probation officers to furnish the Commission with "information available" to them, 18 U.S.C. § 4205(e), both of these provisions have effect only in situations in which the report is "available". If Congress had believed that presentence reports were more important to the Parole Commission than to the courts, Congress might have ordered probation officers to create a presentence report to be forwarded to the Parole Commission in every case, regardless of whether the sentencing court needed a presentence report. But Congress did not do so.⁵

Rule 32(c)(3) of the Federal Rules of Criminal Procedure provides that prior to sentencing, the court shall upon request permit the defendant or his counsel to read the presentence report, exclusive of any recommendation as to sentence. The court may exclude from disclosure "diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or

⁵ Of course, in this case the probation officer in fact prepared a presentence report and forwarded it to the Parole Commission as required. These facts do not diminish the probative value of evaluating the overall congressional scheme for treatment of presentence reports. *See e.g., Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other person". Fed. R. Crim. P. 32(c)(3)(A).

If the court withholds any of the presentence report, the court must provide an oral or written summary not of *all* of the withheld information, but only "of the *factual* information contained therein *to be relied on in determining sentence* . . ." Fed. R. Crim. P. 32(c)(3)(B) (emphasis added). The sentencing court may in its discretion withhold, without summarizing, any portion of the presentence report merely by not relying on that portion of the report in determining the defendant's sentence.⁶ *E.g., United States v. Long*, 411 F. Supp. 1203, 1206 (E.D. Mich. 1976).

We find additional significance in the court's statutorily granted discretion to release the presentence report into the permanent possession of the defendant. Fed. R. Crim. P. 32(c)(3)(D) directs the defendant to return his copy of the presentence report following the imposition of sentence, "unless the court, in its discretion otherwise directs". Although the mandatory disclosure requirements and exemptions in the Parole Act trace many features of the mandatory disclosure requirements and exemptions of Rule 32(c), compare Fed. R. Crim. P. 32(c)(3)(A) with 18 U.S.C. § 4208(c)(1)-(3), *see* H. Conf. Rep. No. 94-838, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 335, 361, the Parole Act contains no provision analogous to Rule 32(c)(3)(D). The Parole Act does not permit the Parole Commission to allow a prisoner to retain a copy of his presentence report. This difference provides evidence of greater court control relative to Parole Commission control over the presentence report. Next, we examine the Parole Commis-

⁶ The *Carson* court understated the sentencing court's discretion by too simply stating that the types of information specified in Rule 32(c)(3)(A) are "not required to be disclosed verbatim but may instead be summarized for the defendant by the sentencing court". *Carson*, 631 F.2d at 1011 (footnote omitted). The *Carson* court's restatement of Rule 32(c)(3)(B) gives the misleading impression that the sentencing court must summarize for the defendant all material that the court does not disclose directly.

sion's power over and use of presentence reports. The use of the presentence report by the Parole Commission clearly does not suffice to convert the presentence report from a court document into an agency record. *See United States v. Charmer Industries, Inc.*, 711 F.2d at 1170 & n.6 (presentence report remained court document despite use by Parole Commission); *Smith v. Flaherty*, 465 F. Supp. at 819 (Bureau of Prisons' possession and use of presentence report did not transform it into agency record).⁷ Although the presentence report may in some cases be central to the Parole Commission's primary function of making parole determinations, *see e.g.*, Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1617 & n.13 (1980); Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 Yale L.J. 1225, 1234 & n.56 (1982), the presentence report's primary function is not that of aiding the Commission. The Parole Commission may gain access to the presentence report only if it is "available", that is, if the sentencing court had decided that a presentence report would aid the court's sentencing discretion. In some cases, the report may simply not exist. Even where the report does exist, it is current and therefore fully relevant when the court considers it; it may well have become out of date, perhaps very old, when the Commission considers it. The longer a convicted offender's term of incarceration and/or parole, the less relevant the presentence report will tend to be to a parole determination. Whether a prisoner has substantially observed the rules of the institution to which he has been confined serves as an important criterion for a parole determination, 18 U.S.C. § 4206(a) & (d), and common sense suggests that reports of behavior during incarceration will assume greater importance

⁷ Cf. *Warth v. Department of Justice*, 595 F.2d at 522-23 (use of trial transcript by agency did not transform transcript into agency record); *Valenti v. United States Department of Justice*, 503 F. Supp. 230, 233 (E.D. La. 1980) (statutory requirement that grand jury transcript be transferred to attorney for the government did not change "essential nature" of transcript from court record to agency record).

relative to presentence behavior the longer the term of imprisonment.

In addition, the presentence report constitutes only one of five sources of information that the Commission "shall consider, if available and relevant", in making a parole determination. 18 U.S.C. § 4207. The other sources of information include reports and recommendations from prison staff, the prisoner's prior criminal record, any parole recommendations made by the sentencing judge, and reports of physical, mental, or psychiatric examinations of the prisoner. The statute also requires the Commission to consider "such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available".

In addition, Congress gave the Parole Commission less discretion than Congress gave the courts concerning the summarization of withheld information. The exemptions from disclosure under the Parole Act, 18 U.S.C. § 4208(c), resemble those listed in Fed. R. Crim. P. 32(c)(3)(A), which governs exemptions from disclosure of presentence reports before sentencing. However, the statutes differ regarding the degree of discretion vested in the entity (the Commission or the courts) that must summarize withheld material for the defendant/prisoner. The Parole Act requires the Commission "to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate". The Commission, unlike the sentencing court, may not withhold without having to summarize nonfactual information (such as opinions or predictions) or information on which the Commission will not rely in making a parole determination. The court, by contrast, need only summarize "factual information . . . to be relied on in determining sentence". Fed. R. Crim. P. 32(c)(3)(B). The Parole Act's command that the Commission "bear[] in mind the need for confidentiality or the impact on the inmate" in summarizing withheld information provides the Commission with no greater discre-

tion than is already provided by the Commission's power to decide whether given material falls within the disclosure exceptions of 18 U.S.C. § 4208(c)(1)-(3).

Finally as stated above, Congress denied the Parole Commission the discretion to permit the prisoner to retain a copy of his presentence report. Rule 32(c)(3)(D) expressly grants such discretion to the sentencing court.

In sum, a document created by and for the court, subject to the discretion of the court to release, is now made available (if it exists) to the Parole Commission, as a more marginal document, supplemented by more recent and perhaps more relevant data, but without discretion to release.

We come now to the critical question: is the possible effect on the sentencing process such that it can be said that Congress intended the compelled release of presentence reports under the FOIA? If so, the FOIA would permit a quick end run around the court's discretion to refuse release of the report to the defendant after sentencing. In this case, we deal with a request by a convicted offender, the subject of the presentence report, but a holding that presentence reports constitute agency records and therefore come within the mandatory disclosure requirements of the FOIA would make copies available (shortly after sentencing) not only to the subject of a presentence report, but also to any third-party requester. Journalists might want hearsay statements about the crime never used in evidence. Police departments might want details about suspected criminal activity. Scholars, researchers, and authors might want information about family background, personal relationships, and community ties. Associates of defendant might want to know if defendant or anyone else implicated them in criminal activity. The report contains in addition such items as defendant's official arrest and conviction record, any recorded contacts with the military, schools, banks, and credit bureaus, and the results of interviews with social service agencies, present and former employers, family members, friends, and neighbors. The report also typically contains medical and clinical evaluations

of defendant's physical and mental health. *See* Fennell & Hall, *supra*, 93 Harv. L. Rev. at 1624-25. Both the sources and subjects of information in the presentence report may bear significant adverse consequences from disclosure of the report to the public.

A convicted offender and his family may well feel jeopardized by retrospective accounts in newspapers; the offender's credit, chances of employment, reception in a given community, and personal and family morale can generally only be harmed rather than helped by open disclosure of his presentence report. Knowledge that anyone could obtain verbatim copies of the report to use (a) to obtain retraction or counterstatement or (b) to be a basis for impeaching action or (c) a basis for vindictive action would only tend to impede the free flow of information — from the accused and from sources independent of the accused — to probation officers who compile presentence reports. *See United States v. Dingle*, 546 F.2d at 1381; *United States v. Greathouse*, 484 F.2d 805, 807 (7th Cir. 1973). There can be debate as to the gravity of the results of publicity. But there can be no dispute that the net affect on the ability of a probation officer to develop a complete presentence report is to diminish that ability and that completeness, making the reports less useful to the sentencing court.

We are mindful that a holding that presentence reports are agency records would not automatically result in FOIA-compelled disclosure of presentence reports to third parties. Such a holding would merely require the Parole Commission to process FOIA requests for presentence reports. The Commission could then perhaps rely on one of the nine exemptions, 5 U.S.C. § 552(b)(1-9), to the FOIA's disclosure requirements to withhold all or part of the report. For instance, the Parole Commission's statutory authority to withhold certain categories of information from the prisoner, 18 U.S.C. § 4208(c), might provide a basis for withholding such information under FOIA exemption 3. *Cf. Lovell v. Alderete*, 630 F.2d 428, 434 (5th Cir. 1980) (justifying withholding of parole recommendation report under FOIA exemption 3). However,

exemption 3, like all FOIA exemptions, must be narrowly construed, and much sensitive material could fall on the margins of 18 U.S.C. § 4208(c)(1)-(3) and thus might not be protected from FOIA-compelled disclosure.

A prisoner's tax or banking history contained in a presentence report might be protected from disclosure under exemption 4, but only if such information was "obtained from a person and privileged and confidential". See, e.g., *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 9-10 (1st Cir. 1983) (information considered confidential under exemption 4 only if government shows that disclosure "will harm an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4"); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969) (information obtained from inside the government not exempt), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

One court has suggested that an entire presentence report might be exempted from disclosure as a predecisional consultative document under exemption 5. See *Smith v. Flaherty*, 465 F. Supp. at 819 n.12. However, most courts have limited the scope of exemption 5 to protect from disclosure only those documents that reflect inter- or intra-agency "give and take" during policy development. See e.g., *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th Cir. 1980); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Presentence reports may well not fit within this exemption.

The entire report or portions thereof, if considered similar to "personnel and medical files" and if disclosure "would constitute a clearly unwarranted invasion of personal privacy", might be exempt from disclosure under exemption 6. Cf. *Malloy v. U.S. Department of Justice*, 457 F. Supp. 543, 545 (D.D.C. 1978) (criminal history records of third parties protected under exemption 6 from disclosure). However, exemption 6 would apply only if presentence reports were considered to be similar to personnel or medical files and if the

privacy interest clearly outweighed the public interest in disclosure. *E.g.*, *Philadelphia Newspapers, Inc. v. United States Department of Justice*, 405 F. Supp. 8, 11 (E.D. Pa. 1975) (permitting disclosure of letters from private persons to federal parole board, despite exemption 6, because of public's interest in factors that prompted early parole of former public official).

Portions of the report that, if released, would constitute an unwarranted invasion of personal privacy or would divulge the identity of a confidential source might be withheld under exemptions 7(C) or 7(D), respectively. While the 7(C) "personal privacy" exemption would at first glance appear to provide an obvious bulwark against disclosure to third parties of information in presentence reports, disclosure may nonetheless be required if the public interest in disclosure — which is significant in matters relating to crime — outweighs the prisoner's privacy interest. Exemption 7(C) only prevents *unwarranted* invasions of personal privacy. *E.g.*, *Columbia Packing Co. v. United States Department of Agriculture*, 563 F.2d 495, 499-500 (1st Cir. 1977); *see New England Apple Council v. Donovan*, No. 83-1400, slip op. at 8 (1st Cir. Jan. 18, 1984) (exemption 7(C) requires balancing privacy interest against public interest in disclosure). And to invoke exemption 7(D), the government must show that the source provided information to the probation officer under an express or implied assurance of confidentiality. *See id.* at 14.

Crooker's attorney asserted for the first time at oral argument that the Privacy Act, 5 U.S.C. § 552a, would bar FOIA disclosure to third parties of the contents of presentence reports unless the prisoner consented to such disclosures. However, the Privacy Act by its terms cannot justify withholding information where the FOIA requires disclosure. 5 U.S.C. § 552a(b)(2) (Privacy Act's consent requirement does not apply to disclosures required by the FOIA); *see Porter v. United States Department of Justice*, 717 F.2d 787, 794 (3d Cir. 1983); *Greentree v. U.S. Customs Service*, 674 F.2d 74, 79 (D.C. Cir. 1982); *Antonelli v. Federal Bureau of Investigation*, 553 F. Supp. 19, 22-23 (N.D. Ill. 1982).

Although one or more of the FOIA exemptions *might* apply in any given case, uncertainty surrounding their scope might inhibit the free flow of information to probation officers who compile presentence reports. The likely chilling or congealing effect on the probation officer — presentence report — judicial sentencing system cannot be dissipated by any such catalogue of exceptions. The fact remains that litigation is possible following the withholding of any FOIA-covered document. Given that the exemptions should be narrowly construed to promote the FOIA's "dominant objective" of "the fullest responsible" disclosure, *Department of the Air Force v. Rose*, 425 U.S. 352, 361-62 (1976), facial applicability of an exemption cannot guarantee nondisclosure of sensitive information. The burden of proving that an exemption justifies nondisclosure remains on the agency, while the person(s) who could be adversely affected by the disclosure may not even know of the request.

Congress has already decided that the goal of ensuring accuracy at sentencing and at parole determinations justifies at least partial disclosure of the presentence report to the defendant/prisoner, notwithstanding any concomitant reduction in the completeness of information contained in the reports. However, when Congress permitted the sentencing court and the Parole Commission to withhold certain enumerated types of information from the defendant/prisoner, Congress evidenced its desire to maintain the competing interest in completeness while requiring partial disclosure at specific times for limited durations. *See* Fed. R. Crim. P. 32(c)(3)(A); 18 U.S.C. § 4208(c); *see also* *United States v. Woody*, 567 F.2d 1353, 1360-61 (5th Cir.) (amended Rule 32(c) balances competing interests), *cert. denied*, 436 U.S. 908 (1978); Fennell & Hall, *supra*, 93 Harv. L. Rev. at 1634 (Rule 32(c)(3) represents "sophisticated compromise" between interests in reliability and completeness). Disclosures to third parties might well sacrifice the interest in completeness without providing any compensating benefit in terms of promoting accuracy.

We therefore hold that it is inappropriate to deem presentence reports to be agency records and thereby not only to override the judicial discretion over release given by Fed. R. Crim. P. 32(c)(3)(D) and to add to the statutory discretion given the Parole Commission, but to change the longstanding rules governing the sentencing process and to threaten to erode the integrity, completeness, and usefulness of the presentence report. The limited disclosure requirements that apply to the courts and the Parole Commission represent a carefully tailored compromise that evolved from many years of full debate. Any further change should come from Congress.

Our holding does not necessarily bar Crooker from receiving a copy of his presentence report. Although Crooker may not compel disclosure of his presentence report from the Parole Commission under the FOIA, he may still request a copy of his presentence report from the sentencing court. *See* Fed. R. Crim. P. 32(c)(3)(D).

II. Disclosure of Medical Records

Crooker also made a FOIA request to the Parole Commission for medical records that the Commission had obtained from the Elmcrest Psychiatric Institute, where Crooker had taken part in a drug detoxification program. The district court approved the Commission's decision to withhold these medical reports under FOIA exemption 3, 5 U.S.C. § 552(b)(3), in light of the specific statutory exemption from disclosure contained in 18 U.S.C. § 4208(c)(2), but ordered the Commission to provide Crooker with a summary of the Elmcrest records. Section 4208(c)(2) states that the Parole Act requirement that the Commission provide a prisoner with "reasonable access" to documents used by the Commission in making parole determinations, 18 U.S.C. § 4208(b)(2), "shall not apply to . . . any document which reveals sources of information obtained upon a promise of confidentiality". This confidentiality provision in the Parole Act satisfies the FOIA exemption 3 requirement that the statutory prohibition on

disclosure "establishes particular criteria for withholding or refers to particular types of matters to be withheld".

In support of its attempt to withhold Crooker's medical records, the government submitted to the district court an affidavit and letter from Parole Commission Regional Counsel Henry Sadowski, stating that Elmcrest Psychiatric Institute had provided the records to the Parole Commission under a promise of confidentiality and that Elmcrest did not consider the records disclosable to Crooker. Based on these representations and on an *in camera* inspection of the medical records, the district court found that Elmcrest released the report to the Parole Commission only upon a promise of confidentiality. The court then held that the FOIA disclosure requirements would be satisfied by the provision of a summary of the contents of the Elmcrest records, as required by 18 U.S.C. 4208(c) prior to parole determination hearings.

We have examined the *in camera* submissions. While release of the entire medical record to Crooker would clearly reveal some confidential sources, the FOIA nonetheless requires disclosure of all reasonably segregable, nonexempt portions of a record. See 5 U.S.C. § 552(b); *County of Madison v. United States Department of Justice*, 641 F.2d 1036, 1043 (1st Cir. 1981). The summary of the medical records that the Commission provided to Crooker on September 23, 1983, pursuant to court order provides an accurate, albeit somewhat elliptical outline of the contents of the medical records.

The district court ordered the Commission to prepare the summary pursuant to 18 U.S.C. § 4208(c). This subsection of the Parole Act requires the Commission to provide a summary of the contents of any material withheld from the prisoner prior to a parole determination hearing. That subsection should not govern required disclosures of partially exempt documents under the FOIA. The FOIA requirement that the requester receive all reasonably segregable data may well provide the requester with more information than he would receive if the Commission, in processing a FOIA request, had

only to "summarize the basic contents of the material withheld" from a document that came within the § 4208(c) exemption. The latter provision governs the extent of partial disclosure in the parole pre-hearing context, not the FOIA context.

On the record before us, it appears that the court could perhaps order the release of more of the Elmcrest records without revealing the source of confidential information contained therein. FOIA exemption 3 and 18 U.S.C. § 4208(c)(2) protect from disclosure only "sources of information obtained upon a promise of confidentiality", not the *substance* of information obtained upon a promise of confidentiality. We recognize that in some cases the disclosure of information would implicitly disclose its source. We remand this issue to the district court to determine if no more information from the Elmcrest records could be released without disclosing the source of the information. *See Church of Scientology v. United States Department of the Army*, 611 F.2d 738, 743-44 (9th Cir. 1979) (remanding to district court for specific findings regarding segregability). We realize that our decision to remand may be overly formal, given that the Commission has already given Crooker much of the disclosable content of the Elmcrest records. However, since it appears that the district court applied an incorrect yardstick to measure disclosure of portions of a document that came within a FOIA exemption, only further — and in all likelihood brief — consideration by the district court will ensure that the Parole Commission has fully complied with the FOIA.

The district court may wish to seek further assistance from the parties in determining the permissible extent of further disclosure. Unless nonexempt portions are inextricably intertwined with portions that explicitly or implicitly reveal a confidential source, all non-exempt information in the Elmcrest medical report should be disclosed to Crooker.

The judgment of the district court is affirmed in part, and vacated and remanded in part; parties to bear their own costs on appeal.

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 83-1687

MICHAEL ALAN CROOKER,
Plaintiff, Appellant,
v.

UNITED STATES PAROLE COMMISSION,
Defendant, Appellee.

JUDGMENT

Entered: March 21, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part and remanded to the district court for further proceedings consistent with the opinion filed this day.

Each party to bear their own costs on appeal.

By the Court:

Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL A. CROOKER)

v .)

) C. A. NO. 83-0110-F

UNITED STATES PAROLE)
COMMISSION)

MEMORANDUM AND ORDER

August 26, 1983

FREEDMAN, D.J.

Plaintiff, a prisoner in federal custody, filed an action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and a subsequent motion for an order to require detailed justification, itemization, and indexing under *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974). The defendant filed a motion to dismiss, F.R.Civ.P. 12(b)(6), submitting an affidavit which listed documents withheld and those disclosed on the grounds that the action was now moot. Shortly thereafter, plaintiff filed 1) a motion for summary judgment, F.R.Civ.P. 56, asserting that a presentence report and medical records were wrongfully withheld from him; and 2) opposition to defendant's motion to dismiss including an assertion that he had not received a copy of the affidavit defendant had submitted.

On June 20, 1983 this Court concluded 1) the case was not moot, there being the issue of whether the presentence report and medical records should be disclosed; and 2) the case would hereafter be considered as though upon cross motions for summary judgment. The Court also ordered defendant to serve a copy of the affidavit upon plaintiff within twenty days

and permitted both parties to file further memoranda in anticipation of both motions, *Crooker v. United States Parole Commission*, Civil Action No. 83-0110-F (June 30, 1983). That time is now at hand and the Court is aided by an additional memorandum from the defendant and two separate reply memoranda from the plaintiff.

The Presentence Report

Plaintiff argues a presentence report is a record subject to the FOIA when in Parole Commission files, *Carson v. United States Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980). However, defendant correctly notes that *Carson* specifically left this question open and remanded it for consideration by the District Court of Washington, D.C., *id.* at 1015. Regardless of how that court may have ultimately resolved the issue in an unpublished opinion, this Court concludes that the FOIA does not mandate disclosure of the presentence report. It was properly withheld on the basis of the Order of the United States District Court for the District of Massachusetts, and on the basis of the Parole Commission's power to make independent judgments concerning the identification of exemptable material. *Carson*, 631 F.2d at 1014. The presentence report is a court document not subject to the FOIA and so falls within the exemption of 5 U.S.C. § 552(b)(3).

The Medical Records

Plaintiff contends that he is entitled to his medical records from the Parole Commission file. However, defendant points out that such records are exempt from disclosure by statute, 18 U.S.C. § 4208(c)(1) and (2), therefore coming within 5 U.S.C. § 552(b)(3). Documents may be withheld from disclosure if they contain material obtained upon the promise of confidentiality. *In camera* inspection of the medical reports, 5 U.S.C. § 552(a)(4)(B), revealed notations on the medical documents stating that they are released to the Parole Commission subject to 42 C.F.R. Part 2 which provides for confidentiality of records. Such notations clearly demonstrate the informant's intentions to release the reports only upon the promise of con-

fidentiality. I, therefore, conclude that all the medical reports on file with the Parole Commission fall within a specific statutory exemption, 18 U.S.C. § 4208(c)(2), and were therefore properly withheld, 5 U.S.C. § 552(b)(3).

It must be noted, however, that the Parole Act requires the Commission to summarize the basic contents of the material which has been exempted and furnish the summary to the inmate, 18 U.S.C. § 4208(c). The defendant is therefore ordered to summarize all medical reports it has properly withheld on the basis of the Parole Act and furnish these summaries to the plaintiff within thirty (30) days of this Order.

The motion of the plaintiff for summary judgment is hereby DENIED. The motion of the defendant for summary judgment is hereby GRANTED. The defendant is ordered to furnish plaintiff with summaries of medical reports within thirty (30) days of this Order.

It is So Ordered.

United States District Judge

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, provides, in pertinent part:

(a) Each agency shall make available to the public information as follows:

(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

*

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*

(4) (B) On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant

*

*

*

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201 *et seq.*, provides in pertinent part:

§ 4205.

- (e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

*

*

*

§ 4207.

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

...

- (3) presentence investigation reports

§ 4208.

- (b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination . . .

- (c) Subparagraph (2) of subsection (b) shall not apply to —

- (1) diagnostic opinions which, if made known to the eligible prisoner, could

lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

(2)
No. 83-2082

Office - Supreme Court, U.S.

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ALEXANDER L. STEVAS.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL ALAN CROOKER, PETITIONER

v.

UNITED STATES PAROLE COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the copy of a presentence report that was prepared pursuant to Fed. R. Crim. P. 32 and transmitted by the probation officer to the Parole Commission for use in making parole determinations is an "agency record" of the Commission for purposes of the Freedom of Information Act, 5 U.S.C. 552.



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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2082

MICHAEL ALAN CROOKER, PETITIONER

v.

UNITED STATES PAROLE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 730 F.2d 1. The opinion of the district court (Pet. App. 22a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on March 21, 1984. The petition for a writ of certiorari was filed on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Parole Commission and Reorganization Act, 18 U.S.C. 4205(e), 4207, 4208 (b) and (c), are reproduced at Pet. App. 25a-27a.

STATEMENT

Petitioner brought this action against the Parole Commission under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking a copy of the presentence investigation report prepared at the time he was sentenced.

1. Petitioner was convicted in the United States District Court for the District of Massachusetts in 1977 on five counts of mailing threatening communications, in violation of 18 U.S.C. 876, and on one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to ten years' imprisonment. A presentence report was prepared by the probation office of that district court pursuant to Fed. R. Crim. P. 32(c). As provided by Fed. R. Crim. P. 32(c)(3)(A), petitioner was permitted to read the entire presentence report prior to sentencing, but he was not permitted to retain a copy of the report after sentence was imposed. See Fed. R. Crim. P. 32(c)(3)(E); Pet. App. 2a.

After sentencing, a copy of petitioner's presentence report was transmitted to the Parole Commission pursuant to the Parole Commission and Reorganization Act (Parole Act), 18 U.S.C. 4201 *et seq.* (Pet. App. 2a). The Parole Act provides that, in determining eligibility for parole, the Parole Commission shall consider, "if available and relevant," various reports and recommendations concerning the prisoner,

including "presentence investigation reports." See 18 U.S.C. 4207(3). To facilitate the Commission's consideration of these materials, the Parole Act provides that, "[u]pon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee" (18 U.S.C. 4205(e)).

Prior to his parole hearing in 1980, petitioner again was permitted to read his presentence report. See 18 U.S.C. 4208(b)(2). However, the Commission, like the sentencing court, did not permit petitioner to retain a copy of the report. Pet. App. 2a. Instead, the Parole Commission's regulations governing release of documents provide that requests to obtain a copy of the presentence report must be directed to the "appropriate court." 28 C.F.R. 2.56(b).

2. In January 1983, petitioner filed an FOIA request with the Parole Commission seeking copies of numerous documents, including his presentence report. The Parole Commission released many of the documents, but withheld its copy of petitioner's presentence report.¹ Petitioner then filed this action against the Parole Commission under the FOIA in

¹ The Commission also withheld certain medical records concerning petitioner that were obtained by the Parole Commission from a psychiatric institution (Pet. App. 2a). The district court concluded that the reports were exempt from disclosure under FOIA Exemption (b)(3), 5 U.S.C. 552(b)(3) (Pet. App. 24a). The court of appeals vacated this portion of the district court's judgment and remanded for the district court to determine whether some portions of the reports could be released to petitioner consistent with the relevant statutory provisions (Pet. App. 18a-20a). That aspect of petitioner's FOIA request is not at issue here.

the United States District Court for the District of Massachusetts seeking disclosure of the presentence report. The district court granted the Parole Commission's motion for summary judgment, holding that a presentence report is a "court document" not subject to the FOIA. Pet. App. 23a.

3. The court of appeals affirmed (Pet. App. 1a-20a).² It observed that the difficulty in resolving the question whether presentence reports are "agency records" subject to the FOIA derives from the fact that the reports have a "hybrid function": pursuant to Fed. R. Crim. P. 32(c), the reports are created and used by the court, which is expressly excluded from the coverage of the FOIA under 5 U.S.C. 551(1)(B); yet after sentencing, the probation officer must furnish a copy of the report to the Parole Commission, which is an agency subject to the FOIA (18 U.S.C. 4218(a)), for use by the Commission in performing its official functions (Pet. App. 4a). The court acknowledged that each of the two entities that uses the report "obviously exercises some 'control' " over it (*id.* at 7a). In these circumstances, the court reasoned, the pertinent inquiry was whether Congress gave the Parole Commission "sufficient control, rela-

² The court of appeals disavowed any reliance upon a standing order of the United States District Court for the District of Massachusetts. The order stated, *inter alia*, that the copy of a presentence report that the court has made available to the Parole Commission or the Bureau of Prisons "constitutes a confidential court document and shall be presumed to remain under the continuing control of the court" and that disclosure by the Commission "is authorized only so far as necessary to comply with [18 U.S.C. 4208(b)(2)]" (Pet. App. 3a n.1). The court of appeals reasoned that such an expression of intent by the originating court would be valid only if it did not contravene the intent of Congress.

tive to control given the courts, over presentence reports" to outweigh the "traditional and statutorily authorized discretion" of the sentencing court under Fed. R. Crim. P. 32(c) to withhold distribution (*ibid.*).

The court of appeals concluded that the Parole Commission did not acquire sufficient dominion over the report to require that result. It relied upon a number of factors: the probation officer creates the presentence report at the direction of the sentencing court; the Parole Commission cannot compel the courts to create a presentence report; the sentencing court has greater discretion than does the Parole Commission to determine what information in the report should be disclosed, summarized, or withheld entirely; and the sentencing court is expressly authorized by Fed. R. Crim. P. 32(c) to permit the defendant to retain a copy of the report after sentencing, but 18 U.S.C. 4208(b) does not expressly authorize the Commission to permit the prisoner to retain a copy of the report.

The court of appeals also observed that a presentence report contains much sensitive information (Pet. App. 13a-14a) and that if disclosure of the presentence report could be compelled under the FOIA, the FOIA "would permit a quick end run around the court's discretion to refuse release of the report to the defendant after sentencing" (*id.* at 13a). The court acknowledged that a holding that presentence reports are "agency records" for purposes of the FOIA would not automatically result in compelled disclosure of them to third parties. However, the court expressed concern that the Commission's assertion of FOIA exemptions might not

adequately protect the reports or sensitive portions of them from public disclosure and that the result might be to inhibit the free flow of information to the probation officers who prepare the reports (Pet. App. 14a-17a). Against this background, the court held that "it is inappropriate to deem presentence reports to be agency records" (*id.* at 18a).

ARGUMENT

The court of appeals was clearly correct in holding that presentence reports are not subject to mandatory disclosure under the FOIA. Under Fed. R. Crim. P. 32(c), even the defendant himself cannot retain a copy of the report after sentencing unless the court, in its discretion, permits him to do so. It also is well settled that third parties cannot obtain a copy of the presentence report from the court absent a showing of particularized need. In view of this strict control over dissemination of the report by the originating court, Congress obviously did not contemplate that the copy of the report that is furnished to the Parole Commission would be subject to mandatory release to the public at large under the FOIA. The result in this case is no different because the requester happens to be the subject of the presentence report. Under the FOIA, the question is whether the document must be released to any member of the public, not to a person who may claim a special interest in its contents. Petitioner therefore has no special standing under the FOIA to obtain a copy of his presentence report.

The court of appeals in this case gave effect to the abiding public interest in the confidentiality of presentence reports by holding that the copy of the report that is furnished to the Parole Commission does

not become a record of the Commission and therefore is not an "agency record" subject to the FOIA. That is the position we urged in the court of appeals. However, in light of the 1983 amendments to Fed. R. Crim. P. 32(c), which were not addressed by the court of appeals, we have reassessed our position and determined, after full consultation with the Parole Commission and other interested parties, that the Commission will not in the future withhold copies of presentence reports on the ground that they are not "agency records" for purposes of the FOIA. But we continue to believe that presentence reports are clearly exempt from mandatory disclosure under the FOIA.

In these circumstances, the petition for a writ of certiorari should be denied. Although the District of Columbia and Ninth Circuits have held that copies of presentence reports that are furnished to the Parole Commission are "agency records" for purposes of the FOIA (see *Carson v. Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980); *Lykins v. Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984); *Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984)), the conflict between those decisions and the decision below is of no continuing importance because presentence reports will not be withheld by the Parole Commission under the FOIA on the "agency records" ground in the future. In addition, no court of appeals has actually ordered the release of the Parole Commission's copy of a presentence report under the FOIA. There accordingly is no conflict among the circuits on the basic question whether a presentence report can be obtained from the Commission under the FOIA. Nor is the issue of the availability of presentence reports under the FOIA otherwise ripe for review by this Court, because the courts of ap-

peals have not yet fully considered the application of FOIA exemptions in this setting.

Review also is not warranted with regard to the circumstances of this particular case. Petitioner concedes (Pet. 2-3) that he read the entire contents of the specific report at issue in this case, both at the time of sentencing and again prior to his parole hearing, and that he took notes about the report on the latter occasion. In short, petitioner has no need to obtain an actual copy of his presentence report under the FOIA.

1. a. Under Fed. R. Crim. P. 32(c)(1), the probation service of the court must make a presentence investigation and report unless the defendant waives that requirement or the court determines that the record already contains sufficient information to permit the meaningful exercise of its sentencing discretion. If a presentence report is prepared, Fed. R. Crim. P. 32(c)(3)(A), as amended in 1983, requires the court to permit the defendant and his counsel to read it at a reasonable time before imposing sentence,³ but not to the extent that it contains (i) diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation, (ii) sources of information obtained upon a promise of confidentiality, or (iii) any other information that, if disclosed, might result in harm to the defendant or other persons. In that event, the court must provide a summary of any factual material contained in the report upon which it intends to rely and must give the defendant and his counsel an opportunity to comment upon that material. Fed. R. Crim. P. 32(c)(3)(B).

³ Prior to 1983, Fed. R. Crim. P. 32(c)(3)(A) only required the court to permit either the defendant or his counsel to read the report upon request.

Under Fed. R. Crim. P. 32(c)(3)(E), any copies of the report made available to the defendant and his counsel "shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs." It also is well established that a third party cannot obtain a copy of the report from the court, at least in the absence of a showing of particularized need for disclosure in the interest of justice.⁴ Compare *Illinois v. Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 8 n.14; *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221-224 (1979). Thus, under Fed. R. Crim. P. 32 and established precedent, the sentencing court unquestionably has control over the presentence report itself, which retains its status as a court document while in the possession of the probation officer.

b. This case, however, concerns the status of the copy of the presentence report that is furnished by the probation officer to the Parole Commission for use in the performance of the Commission's official functions. There are substantial indicia of control by the Commission over that copy of the report and

⁴ See, e.g., *Berry v. Department of Justice*, 733 F.2d at 1352; *United States v. Anderson*, 724 F.2d 596 (7th Cir. 1984); *United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1172-1176 (2d Cir. 1983); *United States v. Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977); *United States v. Cyphers*, 553 F.2d 1064, 1069 (7th Cir.), cert. denied, 434 U.S. 843 (1977); *United States v. Dingle*, 546 F.2d 1378, 1380-1381 (10th Cir. 1976); *United States v. Figurski*, 545 F.2d 389, 391 (4th Cir. 1976); *United States v. Evans*, 454 F.2d 813, 819-820 (8th Cir.), cert. denied, 406 U.S. 969 (1972); *Hancock Brothers, Inc. v. Jones*, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968).

a corresponding absence of indicia of control by the court over the Commission's possession and use of it.

First, the probation officer may not decline to furnish a copy of the presentence report to the Parole Commission, and the court has no authority to prevent him from doing so. Congress has directed the probation officer to furnish the report upon request by the Commission in the same manner as it has directed all other government bureaus and agencies to furnish the Commission with information about the prisoner. 18 U.S.C. 4205(e). Moreover, the Parole Act does not direct the Commission to return the report to the court when the Commission has completed its use of the report or when the prisoner has completed serving his sentence, and we have been informed that the Commission does not ordinarily do so. Instead, the Commission's copy of the report is routinely sent to the Department of Justice's records center along with other documents in the prisoner's file.

Second, the Commission is required by statute to consider the presentence report in making its parole determination (18 U.S.C. 4207(3)), and we have been informed by the Commission that the presentence report frequently is the most important source of information about the prisoner. An adjudicatory body such as the Parole Commission ordinarily is presumed to have primary control over the record of proceedings before it, and the Parole Act does not grant the sentencing court authority to supervise the manner in which the Commission utilizes the presentence report in carrying out its official functions. Cf. *United States v. Addonizio*, 442 U.S. 178 (1979).

Third, under 18 U.S.C. 4208(b), the Commission is required, at least 30 days prior to the parole hearing, to give the prisoner "reasonable access" to the

presentence report and any other document to be relied upon by the Commission in making its determination. The Parole Act does not grant the sentencing court authority to determine whether and in what manner the prisoner will be afforded that right of access.⁵

c. In other circumstances, an agency's receipt, possession, and official use of a document in this manner would lead to the conclusion that the document in question is an "agency record." Compare *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 151, 157 (1980); *Forsham v. Harris*, 445 U.S. 169, 177 n.7, 183-184 (1980). But in the unique context of presentence reports, we cannot ignore the countervailing considerations. The definition of the term "agency" for purposes of the FOIA specifically excludes "the courts of the United States," just as it excludes "the Congress." 5 U.S.C. 551(1)(A) and (B), 552(e). It would undermine the respect for the separation of powers reflected in this exclusion—and the recognition it embodies of the

⁵ Under 18 U.S.C. 4208(c), the right of access does not apply to three categories of information that parallel those that may be withheld from the prisoner under Fed. R. Crim. P. 32(c) (3) (A) at the time of sentencing. As under Rule 32, if a document is deemed by the Commission, the Bureau of Prisons, or any other agency to fall within one of those categories, it is that entity's responsibility to prepare a summary of the material to be furnished to the prisoner. 18 U.S.C. 4208(c). The Parole Commission has informed us that where the sentencing court has summarized material in a presentence report in lieu of disclosing a portion of its contents to the defendant, it is the Parole Commission's uniform practice to furnish the prisoner with the summary prepared by the court rather than to prepare its own summary or to grant him access to the corresponding portion of the presentence report itself.

control each Branch must have over the documents it uses in carrying out its assigned functions—if documents generated by the courts and Congress that come into the possession of an agency subject to the FOIA were too readily deemed to be “agency records.” See *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

Moreover, as we have noted, Fed. R. Crim. P. 32 (c) (3) (E) specifically provides that any copies of presentence reports made available to the defendant and his counsel at the time of sentencing shall be returned to the probation officer immediately following the imposition of sentence “unless the court, in its discretion otherwise directs.” There would be an obvious tension between the authority given the court under this provision to maintain the confidentiality of presentence reports and any holding that copies of the very same reports in the hands of the Parole Commission are subject to mandatory public disclosure under the FOIA. Accordingly, Fed. R. Crim. P. 32 and the policy of confidentiality it embodies properly may inform the determination of whether copies of presentence reports furnished to the Parole Commission are subject to mandatory disclosure under the FOIA. Indeed, the concern for maintaining the confidentiality of presentence reports appears to have tipped the balance for the court of appeals in this case on the “agency records” issue. See Pet. App. 15a-18a.

In our view, however, it is clear that the entire presentence report is exempt from disclosure under the FOIA even if it is regarded as an “agency record” and that the most sensitive portions of the report are further protected by a number of specific FOIA exemptions. See pages 18-21, *infra*. Furthermore, the text and background of the 1983 amendments to Fed.

R. Crim. P. 32, which apparently were not considered by the court of appeals, indicate that copies of presentence reports furnished to the Parole Commission as required by 18 U.S.C. 4205(e) should now be regarded as "agency records" of the Commission. Three features of the 1983 amendments are significant.

First, Fed. R. Crim. P. 32(a)(1) was amended in 1983 to require that the sentencing court determine that the defendant and his counsel have had an opportunity to read the presentence report. The Advisory Committee Note, in explaining the purpose of this requirement, states that the defendant's interest in an accurate report "'does not cease with the imposition of sentence,'" because the report "'plays a crucial role during parole determination,'" since 18 U.S.C. 4207 requires the Commission to consider the report and it "'serves as the primary source of information in calculating the inmate's parole guideline score.'" 97 F.R.D. 245, 306 (1983), quoting Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1651 (1980).⁶ The Advisory Committee Note then concludes that the defendant should be aware at the time of sentencing of these potential uses of the report, although it states that the Advisory Committee rejected a proposal to require the sentencing judge to so inform the defendant. It instead recommended that a form explaining these further uses be attached to the report and be signed by

⁶ The same passage also notes the importance of the report to the Bureau of Prisons in determining the prisoner's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs.

the defendant. 97 F.R.D. at 306. The background of this amendment to Rule 32(a)(1) thus conforms to the policy of the Parole Act, which contemplates that presentence reports will play a crucial role in parole determinations and in effect deems the presentence report to be prepared for the eventual use of the Parole Commission as well as the more immediate use of the sentencing court.

In addition, the 1983 amendments added a new paragraph (D) to Rule 32(c)(3) to provide that if, at the time of sentencing, the defendant or his counsel alleges any inaccuracy in the presentence report, the court must either make a finding with respect to the disputed matter or determine that no such finding is necessary because the matter will not be taken into account at sentencing. Paragraph (D) then concludes: "A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission." The Advisory Committee Note on this amendment explains that "the Bureau of Prisons and the Parole Commission make substantial use of the presentence investigation report" and that the new requirement is intended to ensure that a record is made of the resolution of contested matters so that the Bureau and Commission can accurately assess its contents. 97 F.R.D. at 308. In this respect, then, Congress actually directed the sentencing court to facilitate the consideration of the report by the Bureau of Prisons and Parole Commission.

Finally, and with particular relevance to the "agency records" issue, the Advisory Committee Note on the amendments to Rule 32 concludes (97 F.R.D. at 309):

The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

This disclaimer of authority under Rule 32 for a court to control the Commission's use of the presentence report or its disclosure to the prisoner would appear to remove the basis for reading Rule 32 to require that copies of presentence reports furnished to the Parole Commission be regarded as court documents rather than "agency records." In the absence of any such special restraints imposed by Rule 32, we believe that the other indicia of control by the Parole Commission over its copy of a presentence report (see pages 9-11, *supra*) must lead to the conclusion that that copy is an "agency record" of the Commission.

Against this background of the 1983 amendments to Rule 32, the Parole Commission will not in the future withhold copies of presentence reports under the FOIA on the ground that they are not "agency records" for purposes of that Act.

d. One further point warrants brief discussion. In holding that the Commission's copy of a presentence report is not an "agency record," the court of appeals relied upon what it believed to be the sentencing court's superior prerogatives with regard to the report. This perception was based on the court of appeals' view that the sentencing court has discretion under what is now Fed. R. Crim. P. 32(c)(3)(E) to permit the prisoner to retain a copy of the presen-

tence report, but, the court believed, the Commission does not have that authority under the Parole Act. See Pet. App. 10a, 13a. Contrary to the court of appeals' view, however, the Parole Act does not bar the Commission from giving the prisoner a copy of his presentence report.

The Parole Act provides that the prisoner must be granted "reasonable access" to documents to be used by the Commission in making its parole determination. 18 U.S.C. 4208(b). The Commission has discretion under this provision either to allow the prisoner to read the documents in question or to furnish him with copies of them. See 28 C.F.R. 2.55(a)(3) and 2.56(a).⁷ The Commission has elected to allow

⁷ The express authorization in Fed. R. Crim. P. 32(c)(3)(E) for a court to permit the defendant to retain a copy of the presentence report does not suggest that the absence of such an express authorization in 18 U.S.C. 4208(b) bars the Commission from doing so. The reference in Rule 32(c)(3)(E) to the court's discretion to permit the defendant or his counsel to retain a copy of the report is an exception to the generally applicable requirement in the Rule that any copies of the report be returned to the probation officer after sentencing. As originally proposed by this Court in 1974, Rule 32(c)(3)(D) did not contain that exception, but instead provided that copies of the report "shall not be made" by the defendant, his counsel, or the attorney for the government. H.R. Doc. 93-292, 93d Cong., 2d Sess. 20-21, 71 (1974). Congress amended Rule 32(c)(3)(D) to grant the court discretion in this regard, because "[t]here may be situations when it would be appropriate for either or both of the parties to retain the presentence report." H.R. Rep. 94-247, 94th Cong., 1st Sess. 18 (1975). There is no reason to believe that Congress had changed its mind when it enacted the Parole Act a year later.

Nor is there any reason to believe that Congress would have wanted to withhold the necessary discretion from the Commission. To the contrary, under 18 U.S.C. 4208(b), there is no express requirement that the prisoner return copies of any

the prisoner only to read but not to retain a copy of his presentence report, and has required the prisoner instead to request his own copy of the presentence report from the court that sentenced him. 28 C.F.R. 2.56(b). The effect of the Commission's practice is to defer to the determination made by the court at the time of sentencing with regard to whether the prisoner may have a copy of his presentence report.

Although this is an entirely reasonable way for the Commission to accommodate the statutory requirement that the prisoner have "reasonable access" to his presentence report with the need to maintain the confidentiality of the report, the Parole Act itself does not prohibit the Commission from furnishing the prisoner with a copy of the report.⁸ And indeed it is

documents (including the presentence report) to the Commission after being afforded "reasonable access" to them. There accordingly was no need for Congress to fashion an exception to any such requirement in order to grant the Commission authority to permit the prisoner to retain such copies. The decision whether to do so therefore is committed to the Commission's discretion in implementing the "reasonable access" requirement in 18 U.S.C. 4208(b).

⁸ It is true that the Parole Commission explained when it adopted 28 C.F.R. 2.56(b) that the presentence report "is viewed by the Commission as a court document that cannot be disclosed without the express permission of the court." 44 Fed. Reg. 26551 (1979). However, the Commission did not state in this passage that the *Parole Act* barred the Commission from giving the prisoner a copy of the report, as the court of appeals in this case seemed to hold. The Commission relied instead on what it perceived to be the special status of the report itself, presumably by virtue of its creation pursuant to Fed. R. Crim. P. 32 under the auspices of the court. As we have explained, however, the 1983 amendments to Rule 32 now lead us to a different conclusion.

possible that the Commission in the future would alter its practice and furnish the prisoner with a copy of the presentence report where such access would further sound correctional policies. The essential point for present purposes, however, is that the decision whether to furnish a copy of the report is a matter committed to the Commission's informed judgment, just as the sentencing court itself has discretion under Rule 32 to permit the defendant to retain a copy of the report. The FOIA does not furnish a prisoner or any third party with a right to *insist* upon obtaining a copy of the report, as we shall now explain.

2. Although we have concluded that copies of presentence reports furnished to the Parole Commission should now be regarded as "agency records" for purposes of the FOIA, the court of appeals was correct in holding that they are not subject to mandatory disclosure under that Act. As we have noted above, it is firmly established that a third party may not obtain a copy of a presentence report directly from the sentencing court, at least in the absence of a showing of particularized need for disclosure in the interest of justice. See page 9 & note 4, *supra*. When Congress enacted the Parole Act and required the probation officer to furnish a copy of the presentence report to the Parole Commission, it obviously did not intend that the report thereafter would be routinely made available to the public at large under the FOIA. Because the presentence report is privileged from discovery by third parties while in the possession of the Parole Commission, the Commission's copy of the report is exempt from mandatory disclosure under FOIA Exemption 5, 5 U.S.C. 552(b)(5), which applies to "inter-agency or intra-agency memorandums

or letters which would not be available by law to a party other than an agency in litigation with the agency."

It is of no significance for purposes of Exemption 5 that the well-established bar to disclosure of presentence reports to third parties may be overcome by a showing of particularized need for the report in connection with other proceedings. "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC v. Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7; see also *United States v. Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6-7. For the same reason, it does not matter that the prisoner himself is permitted by Fed. R. Crim. P. 32(c) and 18 U.S.C. 4208(b) to read the report (or summaries of its sensitive portions) prior to sentencing and again prior to his parole hearing. Disclosure to the subject of the report on those occasions is premised upon a determination that he has a special need to review it in connection with the very proceedings for which it was prepared. The pertinent question under the FOIA, however, is whether the document must be released to any member of the public at large, not simply to a person who has a special interest in the document. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 & n.16 (1975). In this case it is clear that Congress did not intend that result.

The fact that Congress did not intend to permit public access to presentence reports is manifest from its enactment of a special statutory procedure in 18 U.S.C. 4208(b) whereby a prisoner may have "reasonable access" to his presentence report and other documents upon which the Commission relies, just as Fed. R. Crim. P. 32(c) requires that the defendant

be afforded an opportunity to read the report prior to sentencing. This special statutory access procedure for a particular category of individuals necessarily precludes a right of access to those same materials by others, including the public at large under the FOIA. See *Zale Corp. v. IRS*, 481 F.Supp. 486 (D.D.C. 1979); *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983); *King v. IRS*, 688 F.2d 488, 495-496 (7th Cir. 1982).⁹ Cf. *Block v. Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 6; *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).

Especially sensitive portions of the report would be protected by other FOIA exemptions as well. Under 18 U.S.C. 4208(c), the Commission is specifically authorized to withhold even from the prisoner those portions of the presentence report that contain (i) diagnostic reports the disclosure of which would disrupt an institutional program, (ii) confidential sources of information, or (iii) other information that might result in harm to any person. Material falling within these provisions plainly qualifies for withholding under FOIA Exemption 3, 5 U.S.C. 552(b)(3), which applies to matters that are "specifically exempted from disclosure by [a] statute" that "refers to particular types of matters to be withheld." See Pet. App. 14a-15a; *Berry v. Department of Justice*, 733 F.2d at 1353-1354.¹⁰

⁹ But see *Linsteadt v. IRS*, 729 F.2d 998, 1001-1003 (5th Cir. 1984); *Currie v. IRS*, 704 F.2d 523 (11th Cir. 1983).

¹⁰ Indeed, against the background of Rule 32(c), the established privilege for presentence reports, and the special provision in 18 U.S.C. 4208(b) for only limited access to the report, 18 U.S.C. 4208 might well constitute an Exemption 3 statute with regard to the entire presentence report.

As the court of appeals recognized (Pet. App. 15a-16a), still other FOIA exemptions would also be available to prohibit mandatory public disclosure. Exemption 4, 5 U.S.C. 552(b)(4), would allow the withholding of commercial or financial information pertaining to the defendant or others. Exemption 6, 5 U.S.C. 552(b)(6), would allow the withholding of any information in the report if its disclosure would result in a clearly unwarranted invasion of personal privacy. And Exemption 7, 5 U.S.C. 552(b)(7), applicable to law enforcement information, would reinforce the Commission's authority under Exemptions 3 and 6 to withhold any information that might disclose confidential sources or result in an unwarranted invasion of privacy.

3. We fully understand and share the view of the sentencing courts and probation officers that the longstanding confidentiality of presentence reports must be maintained and that the reports therefore must be withheld from the public. Our submission in this case should in no way be viewed as a retreat from that position. For the reasons stated above, however, we perceive no realistic prospect that presentence reports—and especially their sensitive portions—would be subject to mandatory release to the public at large under the FOIA if the copies of presentence reports that are furnished to the Parole Commission are regarded as “agency records” within the meaning of the FOIA. Nor does the Commission have any intention of permitting such disclosures. The Commission, like the courts, has a compelling interest in the completeness and accuracy of presentence reports, and the Commission intends to continue to cooperate with the courts to maintain their integrity and confidentiality and to deny public access to them. The Commission also will consult fully with the courts

if in the future it should consider whether prisoners should be permitted to obtain copies of their presentence reports (or portions thereof) in appropriate circumstances where such access would further sound correctional policies without raising countervailing concerns.

4. There remains the matter of the proper disposition of this case. The question whether the court of appeals correctly determined that the Parole Commission's copies of presentence reports are not "agency records" is of no continuing importance, because the Parole Commission will not rely on that basis of withholding in the future.¹¹ Moreover, the broader question of the availability of presentence reports under the FOIA generally does not warrant review at this time. No court of appeals has held that presentence reports must be disclosed pursuant to the FOIA. The precise ground on which the Commission may withhold its copies of the reports—whether because they are not "agency records" subject to the FOIA, as the court of appeals in this case held, or because of the application of FOIA exemptions or Congress's specific provision in 18 U.S.C. 4208(b) for only limited access to them—is of little more than academic interest at this point. Finally, contrary to petition-

¹¹ This "agency records" question in this case also is pending in *Cotner v. Department of Justice*, No. 83-1757, which was argued before the Fifth Circuit on September 27, 1984. The attorney for the government informed the panel in *Cotner* that the Solicitor General has reassessed the matter in connection with the response to the certiorari petition in the instant case and the 1983 amendments to Rule 32 and that we would send a copy of this brief to the court of appeals when it is filed. We accordingly have sent a copy of this brief to the *Cotner* panel. The question is also before the Eleventh Circuit in *Scott v. Parole Commission*, No. 83-8805, which has not yet been set for oral argument.

er's contention (Pet. 5), the court of appeals' disposition of the "agency records" issue does not have broad implications with regard to other types of documents. The court rested its holding in large measure on the peculiar features of presentence reports and the provisions of Fed. R. Crim. P. 32. For these reasons, there is no question of general importance warranting review in this case.

Nor are further proceedings necessary with regard to the particular FOIA request at issue here. Petitioner already has read the entire contents of his presentence report prior to sentencing and again prior to his parole hearing (see Pet. 2-3), pursuant to the provisions of Fed. R. Crim. P. 32(c)(3)(A) and 18 U.S.C. 4208(b) that were specifically intended to govern access to the report by someone in petitioner's position. In these circumstances, the court should not grant review to decide a legal issue that is unlikely to arise again, that will have little if any ultimate bearing on the disclosability of presentence reports under the FOIA, and that is of virtually no practical importance to petitioner.¹²

¹² It is also significant that in all of the FOIA cases decided by the courts of appeals involving a request for a copy of a presentence report from the Parole Commission, the requester has been the prisoner himself. *Pet. App. 2a*; *Berry v. Department of Justice*, *supra*; *Lykins v. Department of Justice*, *supra*; *Carson v. Department of Justice*, *supra*; *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968). Accord, *Lindsey v. Bureau of Prisons*, 736 F.2d 1462 (11th Cir. 1984), petition for cert. pending, No. 84-5412 (prisoner's suit to obtain a presentence report from the Bureau of Prisons). Because a prisoner has two opportunities to read his report, a prisoner's suit under the FOIA seeks only whatever incremental advantage there might be in obtaining an actual copy of the report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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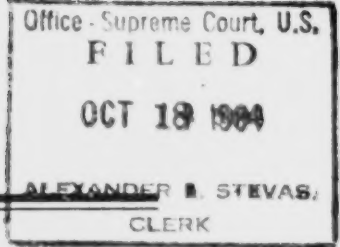
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OCTOBER 1984



No. 83-2082



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MICHAEL ALAN CROOKER,
Petitioner,

v.

UNITED STATES PAROLE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF IN OPPOSITION**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

No. 83-2082

MICHAEL ALAN CROOKER,
Petitioner,

v.

UNITED STATES PAROLE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF IN OPPOSITION**

Now that respondent has changed its position on the central legal issue presented by this case, petitioner Michael Alan Crooker urges this Court to grant his petition for a writ of certiorari, to vacate the judgment below summarily, and to remand this case to the United States Court of Appeals for the First Circuit for further proceedings.

STATEMENT

Petitioner brought this action under the Freedom of Information Act ("FOIA") to obtain a copy of his presentence report which is in the possession of the respondent United States Parole Commission. Although petitioner has twice seen his entire presentence report, first pursuant to Rule 32(c) of the Fed. R. Crim. P., in connection with his original sentencing, and subsequently pursuant to 18 U.S.C. § 4208, in connection with a parole proceeding, he has not been permitted to keep a copy of it. However, under the FOIA, a requester is entitled to a copy of any agency record which is not exempt from disclosure. 5 U.S.C. § 552.

The United States Court of Appeals for the First Circuit held that petitioner was not entitled to a copy of his presentence report solely on the ground that the report is not an "agency record" within the meaning of the jurisdictional provision of the FOIA, 5 U.S.C. § 552(a)(4)(B). (App. 18a). According to the First Circuit, despite the Parole Commission's possession and use of presentence reports, they remain court documents, which fall outside the reach of the FOIA. (App. 11a). As to certain of petitioner's medical records, the court vacated the district court's decision and remanded the case for further proceedings. (App. 20a).

Petitioner then sought certiorari, pointing to a conflict in the circuits over whether presentence reports are "agency records." (Petition at 7-9). In addition to the conflicts cited in his petition, there are two recent decisions by the Ninth and Eleventh Circuits which address this issue. The District of Columbia and Ninth Circuits have held that presentence reports are "agency records," *Carson v. Department of Justice*, 631 F.2d 1008 (D.C. Cir. 1980); *Lykins v. Department of Justice*, 725 F.2d 1455 (D.C. Cir.

1984); *Berry v. Department of Justice*, 733 F.2d 1543 (9th Cir. 1984), while the Tenth and Second Circuits, in addition to the First Circuit, have concluded that presentence reports are not "agency records" under the FOIA, *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (*per curiam*), cited with approval in *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976); *United States v. Charmer Industries*, 711 F.2d 1164, 1170 n. 6 (2d Cir. 1983), and the Eleventh Circuit has ruled that the same reports, while in the possession of the Bureau of Prisons, are not agency records. *Lindsey v. Bureau of Prisons*, 736 F.2d 1462 (11th Cir. 1984), *petition for cert. pending*, No. 84-5412.

In his opposition, the Solicitor General now concedes that a presentence report in the possession of the Parole Commission is an "agency record" subject to the disclosure requirements of the FOIA, *i.e.*, that a copy must be provided to the petitioner unless one or more of the Act's nine exemptions allow the Commission to withhold the report. Opposition at 7. Moreover, the Solicitor General has represented that the Parole Commission will no longer rely on the argument that such reports are not agency records as a basis for withholding in the future. *Id.* However, despite his concession that the legal theory that the respondent argued and the First Circuit adopted below is in error, the Solicitor General nonetheless takes the position that certiorari should be denied and that petitioner should be denied any relief whatsoever on the ground that he has "no need to obtain a copy of his presentence report." Opposition at 8.

**THE PETITION SHOULD BE GRANTED AND THE
CASE REMANDED FOR FURTHER PROCEEDINGS
IN LIGHT OF THE RESPONDENT'S CONCESSION
ON THE AGENCY RECORD ISSUE.**

1. In the court below, and in every other FOIA case concerning a prisoner's request for a copy of his presentence report, including several very recent ones, the government has vigorously asserted that the report is not an "agency record" under the FOIA. *Cook v. Willingham, supra*; *Carson v. Department of Justice, supra*; *Berry v. Department of Justice, supra*; *Lindsey v. Bureau of Prisons, supra*; *Cotner v. United States Parole Commission*, Civil No. 83-1687 (N.D. Tex. Sept. 14, 1983), *appeal pending*, No. 83-1757 (5th Cir.); *Smith v. Flaherty*, 465 F. Supp. 815 (M.D. Pa. 1978). Thus, the Solicitor General's recent concession that the presentence report is an "agency record" is a complete reversal of the government's previous position on this issue. Therefore, since the "agency record" ground was the only basis for the court of appeals' decision in this case, that judgment must be vacated. See *Joseph v. United States*, 405 U.S. 1006 (1972); *Lenhard v. United States*, 405 U.S. 1013 (1972); *Janko v. United States*, 366 U.S. 716 (1961); *Dusky v. United States*, 362 U.S. 402 (1960); *Urrutia v. United States*, 357 U.S. 577 (1958).

In defending its about-face, the government claims that the 1983 amendments to Fed. R. Crim. P. 32 were the basis for its decision to "reassess" its position on the agency record issue. Opposition at 7-8. However, those amendments simply require the sentencing court to ensure that the defendant and his counsel have had an opportunity to read the report before sentencing, and they require the court to transmit findings of inaccuracies to the Parole Commission. 97 F.R.D. 245 (1983). While the Advisory Committee notes acknowledge both the importance of the

report to Parole Commission proceedings and the independent authority of the Commission to disclose the report to the prisoner, 97 F.R.D. at 305-308, this hardly constitutes, as respondent suggests, a recent congressional decision "to remove the basis for reading Rule 32 to require that copies of presentence reports furnished to the Parole Commission be regarded as court documents rather than 'agency records.'" Opposition at 15. Moreover, the 1983 amendments to Rule 32 became effective on April 28, 1983, seven months before the government filed its brief in the court of appeals in this case. 97 F.R.D. at 245. Therefore, notwithstanding the Solicitor General's efforts to paint a picture of intervening circumstances, the government's change in position here represents nothing less than a confession of error.

2. Despite the government's reversal on the agency record issue, the Solicitor General takes the position that no further proceedings are necessary with regard to the petitioner's FOIA request because he has already seen the contents of his report. Opposition at 23. However, under the FOIA a requester is entitled to a copy of any agency record that is not exempt from disclosure. 5 U.S.C. § 552(a). Thus, the mere opportunity to inspect a record does not meet the disclosure requirements of the Act. *See Perry v. Block*, 684 F.2d 121, 124 n.14 (D.C. Cir. 1982).

Moreover, although the Solicitor General attempts to minimize the importance of prisoners being able to obtain copies of their presentence reports, *see* Opposition at 8, 23 & n.12, prisoners have a strong interest in obtaining copies of their reports so that they can scrutinize their accuracy, correct errors and misleading information, and prepare for parole proceedings by being able to anticipate and respond to arguments based on information contained in the reports. *See Berry v. Department of Justice, supra*, 733

F.2d at 1355-56. Indeed, the Parole Commission itself has declared that "it is good correctional practice that a prisoner be given a copy of the presentence report, *to keep*" Letter from Joseph A. Barry, General Counsel of the Parole Commission (May 5, 1983), included in Appellant's Brief to the First Circuit, Addendum p. 10 (emphasis added). While the Solicitor General suggests that the public at large should not have access to presentence reports, he provides no reasons why petitioner and other prisoners should not receive copies of their own reports.

Therefore, unless the decision below is vacated and remanded, petitioner will be prejudiced by being denied the opportunity to assert his statutory right to obtain a copy of his presentence report. Indeed, a denial of certiorari, which respondent urges, would have the ironic effect that petitioner, whose efforts have resulted in the change in respondent's legal position, would be denied access to his report, while others, who are still litigating in the courts or who may make FOIA requests in the future, may be able to obtain copies of theirs.

3. Finally, the Solicitor General argues that no further proceedings are necessary in this case because the reports can still be withheld in their entirety under various exemptions to the FOIA, in particular, exemption 5. Opposition at 18-19. Significantly, however, the government has not asked this Court to address these arguments on the merits. Therefore, unless this case is remanded for further proceedings, petitioner will have no opportunity to address the government's claims of exemption.

Moreover, respondent's contentions are without merit. First, the government has waived its opportunity to litigate the exemptions by failing to raise them either in the district court or the court of appeals. *See Ryan v. Department of*

Justice, 617 F.2d 781, 792 (D.C. Cir. 1980); *Jordan v. Department of Justice*, 591 F.2d 753, 778-79 (D.C. Cir. 1978) (*en banc*). In addition, because petitioner has already seen the entire contents of his report, the government has specifically waived any otherwise applicable FOIA exemption as a basis for withholding it from him. See, e.g., *N.D. v. Andrus*, 581 F.2d 177, 180-82 (8th Cir. 1978); *Mead Data Central v. Department of Air Force*, 566 F.2d 242, 253, 257-58 (D.C. Cir. 1977).

Finally, although this Court need not, and indeed should not, resolve any matters relating to a claimed exemption since the lower courts have not even considered such claims, the government's exemption 5 claim is inapplicable in this case, where petitioner seeks access to his own presentence report. Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As the Solicitor General recognizes, Opposition at 19, this Court has held that "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC v. Grolier, Inc.*, 103 S.Ct. 2209, 2214 (1983); see also *United States v. Weber Aircraft Corp.*, 104 S.Ct. 1488, 1493 (1984). Under both Rule 32(c) of the Fed. R. Crim. P. and the Parole Act, 18 U.S.C. § 4208, the prisoner and his attorney are statutorily entitled to review the contents of the report. Therefore, since the "normal" rule at sentencing and parole hearings is that prisoners have a right to review their presentence reports, exemption 5 is simply inapplicable to an FOIA request by a prisoner, including the petitioner, for his own presentence report.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted, and the Court should vacate the judgment below and remand the case to the Court of Appeals for the First Circuit for further proceedings.

Respectfully submitted,

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